

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1988-89/9
Fees: Arrangement Which Effectively Passes Costs on to a Third Party
December 8, 1988

RULE REFERENCES:

*Rule 1.5
*Rule 1.5(a)(4)
*Rule 1.5(a)(6)

SUBJECTS:

*Banks
*Fees
*Real Estate/Realtors

ANNOTATIONS:

A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee, based on various factors including the amount involved and the results obtained, and the nature and length of the professional relationship with the client. (Rules 1.5; 1.5(a)(4); 1.5(a)(6))

The fee agreement is a matter for negotiation between the lawyer and the client, and there is no basis for disturbing that agreement unless the fee is illegal or clearly excessive. (Rule 1.5)

QUESTION:

The inquiring attorney represents mortgage company clients, and handles foreclosure proceedings for these clients. Occasionally, the mortgage being foreclosed is insured by the U.S. government. In such foreclosures, the foreclosing mortgage company may purchase the property itself at the foreclosure, and then convey the property to the insuring agency of the federal government. Under such circumstances, the government limits the amount of foreclosure costs for which it will reimburse the mortgage company. The inquiring attorney suggests that the schedule of foreclosure costs allowed by the governmental agencies is unrealistic, thus requiring the mortgage company to absorb several hundred dollars in legal expenses for each such foreclosure.

The inquiring attorney would like to be able to handle foreclosures which go to sale and involve property subsequently conveyed to the government agency at a reduced rate. This would benefit his mortgage company clients. In other cases (i.e. where the foreclosed property is purchased by the debtor or a third party), the inquiring attorney proposes to charge his standard rate. His question is whether such a "dual rate" arrangement violates the Rules of Professional Conduct.

RESPONSE:

The fact situation described above is covered by Rule 1.5 which governs fee agreements. The rule has one bright line: "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Although this standard is different from the "reasonableness" standard set forth in the American Bar Association's model rules, the rule does go on to list eight factors which are to be considered in determining the *reasonableness* of a fee. For the purposes of this inquiry, the most important of these factors are: (a)(4), the amount involved and the results obtained and (a)(6) the nature and length of the professional relationship with the client.

The inquiry letter demonstrates that the inquiring attorney wishes to enter into a fee agreement with his mortgage clients which would benefit those clients. His desire to do so is apparently based on the relationship which he has established with these clients. Rule 1.5 makes clear that the fee agreement is a matter for negotiation between the lawyer and the client, and that there is no basis for disturbing that agreement unless the fee is illegal or clearly excessive. Since the rule allows a broad range of factors to be considered (including the nature and length of the professional relationship with the client and the results obtained), we see no aspect of the rule which would be violated by the arrangements set forth in the inquiry letter. Although the rule does not require a written fee agreement under the circumstances which are the subject of this inquiry, the inquiring attorney should consider developing a written fee arrangement to avoid possible misunderstandings.